# Telemedicine without frontiers

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# Telemedicine without frontiers: does the internet change medical licensing requirements?

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The fact that cross-border e-commerce often gives rise to complex legal issues is well documented. But little attention has been given to such issues where medical services are provided online. Telemedicine is the term for medical information being transferred by phone, the internet or other networks for the purpose of consulting, and sometimes remote medical procedures or examinations.[1]

Taking as its point of departure the recently decided US case *Hageseth v Superior Court* 2007 CA App (1st) 54 (the *Hageseth* case), this article examines the legal issues associated with licensing of cross-border telemedicine.

## Background to *Hageseth*

In *Hageseth*, a doctor licensed to practice medicine in Colorado (Dr Hageseth), prescribed drugs for a 19 year old man, McKay, in California. While under the influence of alcohol, McKay used the prescribed medicine (fluoxetine, the generic for Prozac) to commit suicide. The situation is complicated as Dr Hageseth was physically located at his home in Colorado when he issued the prescription over the internet. Further, while he was aware that McKay's home was in California, he never interacted directly with McKay. Dr Hageseth had been asked by a Florida-based company to assess McKay's request for medication and the medicine was shipped from a pharmacy in Mississippi to McKay in California. Complicating things further, the website on which McKay ordered the drugs was operated by a company in India.

When he attracted police attention for a minor offence in Nebraska, Dr Hageseth was extradited to California. There he argued that the court lacked jurisdiction, as no part of his conduct took place in California and, in his view, his act of practising medicine began and ended in Colorado where he wrote the prescription.

## Relevant law

While a situation such as that in the *Hageseth* case could arise in both domestic and international settings, it is important to understand the Californian law in question. Under Californian law, as in many other jurisdictions, it is a crime to practice medicine in that state without a Californian license. More specifically, any person who:

> [P]ractices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any … physical or mental condition of any person, without having at the time of so doing a valid, unrevoked, or unsuspended certificate as provided in this chapter or without being authorized to perform the act pursuant to a certificate obtained in accordance with some other provision of law is guilty of a public offense, punishable by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the state prison, by imprisonment in a county jail not exceeding one year, or by both the fine and either imprisonment.[2]

Further, Californian Penal Code permits the punishment of a defendant under Californian law for any criminal act committed in whole or in part in California: "persons are liable to punishment under the laws of this state … who commit, in whole or in part, any crime within this state".[3]

Importantly, Californian law encompasses the principle of objective territorial jurisdiction (effects doctrine); that is, when a crime is committed outside but consumed inside jurisdiction, then court can claim jurisdiction:

> When the commission of a public offense, commenced without the State, is consummated within its boundaries by a defendant, himself outside the State, through the intervention of an innocent or guilty agent or any other means proceeding directly from said defendant, he is liable to punishment therefore in this State in any competent court within the jurisdictional territory of which the offense is consummated.[4]

## Judgment

In light of the law as outlined above, the court concluded that the Californian court could claim jurisdiction:

> A preponderance of the evidence shows petitioner prescribed medication for a resident of this state, aware of the virtual certainty his conduct would cause the prescribed medication to be sent to that person at his residence in California. This state is thus the place where the crime is "consummated". The fact that other parts of the crime were committed elsewhere is immaterial, as there is no constitutional or other reason "that prevents a state from punishing, as an offense against the penal laws of such state, a crime when only a portion of the acts constituting the crime

> are committed within the state". (*People v. Botkin* (1908) 9 Cal App 244, 251 [98 P. 861].) Accordingly, respondent court possesses the necessary jurisdiction.[5]

This outcome may have been both logical and desirable. However, care must be taken in where we view the practice of medicine as taking place. If we had concluded that Dr Hageseth practiced medicine only in Colorado, he could not have come under the jurisdiction of a Californian court. However, also viewing his conduct as taking place in California has an undesirable implication. In such a case, Dr Hageseth's conduct may not be regulated by the Medical Board of Colorado.

Consequently, it is submitted that the solution lies in concluding that in doing what he did, Dr Hageseth practiced medicine in both Colorado and California. This is no stranger than the fact that a telephone conversation between a person in California and one in Colorado takes place at both places — there is no need to identify a single location — or, at least, the disadvantages of identifying a single location outweigh the advantages of doing so.

Alternatively, the rules of the license issuing authority must make clear that the doctor's conduct, wherever it is carried out, is regulated by the authority.[6]

## Does the internet change the situation?

Interestingly, the court in *Hageseth* acknowledged that, under certain circumstances, internet technology may be different enough to warrant novel legal interpretations, and that it is for the defendant to prove that it was so. This is certainly a step in the right direction, and it is submitted that every time a court is faced with a case involving internet use, it must consider whether the application of established legal principles to that technology constitutes the mere application of those principles or an actual widening of the scope of those principles. In many cases, this can be done in a summary fashion and will take little of the court's time. In other cases, it will be a complex task requiring a solid understanding of internet technology.

In this context, it is interesting to revisit how the High Court approached the internet in the famous *Gutnick*[7] case. Kirby J recognised the novel features of the internet and stated that:

> Intuition suggests that the remarkable features of the internet (which is still changing and expanding) makes it more than simply another medium of human communication. It is indeed a revolutionary leap in the distribution of information, including about the reputation of individuals.[8]

In sharp contrast, Callinan J stated:

> The internet, which is no more than a means of communication by a set of interconnected computers, was described, not very convincingly, as a communications system entirely different from pre-existing technology.[9]

It will be interesting to see which of these views prevails in coming years.

In arguing that the internet made his situation different to offline situations, Dr Hageseth presented three arguments, all of which were criticised by the court.

First, Dr Hageseth argued that he lacked notice of the unlawfulness of his conduct, and consequently it would be unfair to find that he has to defend the action in California.[10] On this issue, the court noted that the Californian approach of requiring a license is neither obscure nor unusual and that particularly a licensed medical practitioner ought to be aware of this approach.[11]

Second, Dr Hageseth suggested that claiming jurisdiction will not deter others from unlawful conduct.[12] In response, the court pointed to the absence of national and international regulation, which it argued meant that states need to regulate.[13]

Third, Dr Hageseth asserted that the court claiming jurisdiction in this situation will deter telemedicine.[14] The court did not agree.[15]

The *Hageseth* case highlights the significant complications that face telemedicine due to the limited geographical reach of medical licensing schemes. It should be clear that telemedicine can never reach its full potential unless these complications are addressed.

## Australian law

It is interesting to consider how a similar case would have been decided in Australia. Like the US, Australia has rules regulating the practice of medicine. While regulation takes place at state level, there is a great degree of national uniformity due to the fact that all Australian jurisdictions have similar statutory requirements for the registration of health care professionals.[16] Looking at Queensland, s 161(2) of the Medical Practitioners Registration Act 2001 is comparable to s 2052 of the Californian Business and Professions Code that is of central importance in the *Hageseth* case:

> A person who is not a registrant must not, by means of any conduct in contravention of subsection (1)—
>
> (a) under colour or pretence of being registered under this Act or of being eligible to be registered under this Act—
>
> (i) obtain any employment; or
>
> (ii) obtain access to a hospital, clinic, medical practice or other place; or
>
> (iii) carry out, or purport to carry out, a surgical operation, procedure or treatment; or
>
> (iv) conduct, or purport to conduct, a medical consultation with a person or a medical examination of a person; or
>
> (v) diagnose, or purport to diagnose, an illness or the absence of an illness; or
>
> (vi) prescribe or recommend a drug, vitamin, herb or other medication, substance, treatment, remedy or cure for an illness; or

(vii) perform or provide a medical service or purport to perform or provide a medical service; or
(viii) sign, or give to a person, a medical document or document that purports to be a medical document; or
(ix) conduct, or purport to conduct, an autopsy or post mortem examination or otherwise diagnose or determine, or purport to diagnose or determine, a cause of death or the circumstances relating to a death; or

(b) offer, promise or agree to do anything mentioned in paragraph (a); or
(c) charge, recover or retain a fee or other consideration for doing or purporting to do, or promising or agreeing to do, anything mentioned in paragraph (a); or
(d) claim, recover or retain a fee or other consideration from a health insurance fund or other entity for doing or purporting to do, or promising or agreeing to do, anything mentioned in paragraph (a).

Maximum penalty — 2000 penalty units or 3 years imprisonment.

Several Australian states have similar rules of criminal jurisdiction to the relevant Californian rules in the *Hageseth* case.[17] For example, s 10C of the Crimes Act 1900 of NSW extends criminal jurisdiction to offences committed wholly outside the state, provided that the offence has an effect in the state. Similarly, s 12 of the Criminal Code 1899 (Qld) states that:

> Where an event occurs in Queensland caused by an act done or omission made out of Queensland which, if done or made in Queensland, would constitute an offence, the person who does the act or makes the omission is guilty of an offence of the same kind and is liable to the same punishment as if the act or omission had occurred in Queensland.

In light of this, it seems that a situation such as the *Hageseth* case could arise also in (at least parts of) Australia. However, unlike the US, Australia has a well-developed system of mutual recognition of registrations:

> Under the Mutual Recognition Act 1992 (Cth) health care professionals registered in one state or territory only need to give notice (including evidence of home registration) and pay the prescribed fee to the relevant registration authority.[18]

Consequently, had the *Hageseth* case taken place in Australia, Dr Hageseth could have given notice to the patients' states and paid the relevant fee prior to issuing the prescription, and thereby presumably avoided any problems.

At the same time, it must be noted that in the case of a medical practitioner based outside Australia providing medical services to a patient in Australia, the mutual recognitions system would obviously not protect the practitioner.[19]

## Conclusion

This article has highlighted some licensing or registration complications that may arise in the context of cross-border telemedicine. The *Hageseth* case is a very clear illustration of the risks that health care practitioners take when engaging in cross-border telemedicine.

The discussion suggests that the Australian approach of mutual recognition of registrations is a good way of avoiding these complications in the domestic health care market. At the same time, it is also clear that significant harmonisation efforts are required on an international level if cross-border telemedicine is to reach its full potential.

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## Footnotes

1. http://en.wikipedia.org/wiki/Telemedicine.
2. Californian Business and Professions Code s 2052.
3. Californian Penal Code s 27.
4. Above s 778.
5. *Hageseth v Superior Court* 2007 CA App (1st) 54 at 1418.
6. In Australia, the mutual recognition scheme in place deals effectively with this issue. Where a health care practitioner loses her/his registration in one jurisdiction, she/he also loses it in other jurisdictions part of the mutual recognition scheme. See further *Australian Health and Medical Law Reporter*, para 3–060.
7. *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; 194 ALR 433; [2002] HCA 56; BC200207411.
8. *Above* para 164.
9. *Above* para 180.
10. *Above n 5* at 1422.
11. *Above n 5* at 1422.
12. *Above n 5* at 1422.
13. *Above n 5* at 1423–24.
14. *Above n 5* at 1422.
15. *Above n 5* at 1424.
16. *Australian Health and Medical Law Reporter*, para 3–040.
17. See further Lanham, D "Crime and Conflicting Duties Across Borders" (2001) 25(1) *Criminal Law Journal* 19.
18. *Australian Health and Medical Law Reporter*, para 3–060.
19. Note, however, that the mutual recognition scheme also covers New Zealand through the various state-based Trans-Tasman Mutual Recognition acts.